AGM Duty Free (Tengah) Sdn Bhd v Mohamad Hafiz bin Ishak & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-707–12 OF 2023
MARIANA YAHYA, HASHIM HAMZAH AND FAIZAH JAMALUDIN JJCA
16 JANUARY 2025

Customs and Excise — Seizure — Intoxicating liquors ('goods') — Customs officers seized substantial amount of beers from private store on suspicion that offence under Customs Act 1967 ('the CA') had been committed — Since no prosecution was initiated, owner claimed for return of seized goods two days before expiry of 30 days from date goods were seized — Customs never released goods but nine months after seizure informed owner that prosecution would commence in due course — Whether non-release of seized goods by Customs was unlawful and invalid under s 128 of CA — Whether absent prosecution within the 30-day timeframe, Customs should have either released the goods or referred matter to magistrate for decision

On 23 September 2022, Customs officers seized 2,430 cartons of beer ('the seized goods') from the appellant's premises and from its lorry on suspicion that an offence under s 135 of the Customs Act 1967 ('the CA') had been committed. No prosecution followed, and on 21 October 2022, the appellant sent the respondents a notice claiming for return of the seized goods. There was no response. On 19 June 2023, the appellant, through its solicitors, notified the respondents that it would take legal action if the seized goods were not released. On 26 June 2023, the first respondent ('R1' — the Customs investigating officer of the case) wrote to the appellant stating that investigations had been completed and that consent to prosecute the appellant had been obtained from the public prosecutor ('PP'). The appellant filed an originating summons ('OS') in the High Court to, inter alia, declare the respondents' continued seizure of the seized goods as unlawful and sought special, general and exemplary damages against the respondents. The High Court dismissed the OS and ordered that: (a) prosecution under s 127(1) of the CA be commenced against the appellant within two months from the date of service of the court's order, failing which the continued seizure of the goods be deemed unlawful and invalid; and (b) if such deeming, as aforesaid, came into effect, or if the court hearing the prosecution decided that no forfeiture order should be made against the seized goods, then the appellant be at liberty to apply for assessment of damages payable to it. In its instant appeal, the appellant argued that: (i) upon expiry of 30 days from the seizure, since the appellant had already claimed for return of the seized goods and no prosecution

had been initiated, the respondents should have either released the seized goods or referred the matter to a magistrate for a decision under s 128(3) of the CA and since this was not done, the continued seizure of the goods was unlawful; (ii) the law envisaged that prosecution should be commenced within 30 days from the date a notice of claim for release of the seized goods was made; and (iii) the High Court had usurped the PP's prosecutorial power under art 145 of the Federal Constitution by ordering the appellant to be prosecuted within two months. In their cross-appeal, the respondents agreed with the appellant on the issue of usurpation of the PP's power. However, they submitted that s 128(3) of the CA was not contravened as the provision did not specify a timeframe (after expiry of the 30 days) for Customs to either release the seized goods or to refer the matter to a magistrate for decision.

Held, unanimously allowing the both the appeal and cross-appeal, setting aside the High Court's decision and remitting the matter to the High Court for assessment of damages payable to the appellant:

(1) The respondents did not commence any prosecution against the appellant within 30 days of the date of notice of seizure as required under s 128(1) of the CA, nor did they refer the appellant's claim to the court for an inquiry under s 128(4) of the CA upon expiration of 30 days from the date of the appellant's claim. The respondents' blatant refusal to comply with the law rendered the seizure wrongful and unlawful entitling the appellant to damages. Non-compliance with s 128 of the CA was fatal as it deprived a person of his property contrary to art 13(1) of the Federal Constitution (see paras 49–50, 53 & 67).

(2) Section 128 of the CA expressly stated that if there was no prosecution with regard to seized goods within 30 days from the date of notice of the seizure, the goods would be deemed forfeited. This meant that if the respondents intended to prosecute, the prosecution must be commenced within 30 days from the date of seizure. But if a claim had been made for return of the goods within the 30 days, then either the prosecution must be commenced within 30 days from the date of the claim, or, upon expiry of the 30 days, the matter must be referred to the Director-General of Customs ('DG') who shall then either direct the goods to be released or refer the matter for a proceeding under s 128(4) of the CA (see paras 54–56).

(3) There was no cogent evidence to show that the respondents had taken any action in respect of the seized goods from 21 October 2022 until the appellant gave notice that it would take legal action if the seized goods and motor lorry were not released. After being silent for nine months since the seizure, the respondents informed the appellant in June 2023 that investigations had been completed and that consent to prosecute the appellant had been obtained from the deputy public prosecutor. The

court had no opportunity to ascertain the actual date when the consent to prosecute was obtained. There was no conclusive proof that the consent to prosecute was made before the expiration of 30 days from the appellant's notice of claim. There was also no evidence to show that the respondents had informed the appellant that the matter was under investigation before 26 June 2023 (see paras 58–60 & 62).

(4) The High Court erred in holding that there was no timeframe under ss 128(3) and (3A) of the CA for the seized goods to be released or to be referred to the court on the expiration of 30 days. The High Court had misconstrued the interpretation of s 128(3) of the CA and had failed to follow the Federal Court's decision on the point in *Sarmiina Sdn Bhd v Gerry Ho & Ors* [2023] 4 MLJ 870. The High Court also misdirected itself when it applied s 127(1) of the CA to the facts of the case when that provision was not applicable at all (see paras 64–66).

(5) The High Court violated art 145 of the Federal Constitution when it usurped the prosecutorial power of the AG/PP under that article by ordering that the appellant be prosecuted within two months of receipt by the respondents of the sealed order (see paras 68–70).

[Bahasa Malaysia summary

Pada 23 September 2022, pegawai Kastam merampas 2,430 karton bir ('barang yang disita') dari premis perayu dan dari lorinya kerana disyaki bahawa kesalahan di bawah s 135 Akta Kastam 1967 ('AK') telah dilakukan. Tiada pendakwaan dilakukan, dan pada 21 Oktober 2022, perayu menghantar notis kepada responden menuntut pemulangan barang yang disita. Tiada jawapan diberikan. Pada 19 Jun 2023, perayu, melalui peguamcaranya, memaklumkan responden bahawa ia akan mengambil tindakan undang-undang sekiranya barang yang disita tidak dipulangkan. Pada 26 Jun 2023, responden pertama ('R1' — pegawai penyiasat Kastam kes itu) menulis kepada perayu menyatakan bahawa siasatan telah selesai dan bahawa kebenaran untuk mendakwa perayu telah diperoleh daripada pendakwa raya ('PR'). Perayu memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk, antara lain, mengisytiharkan penyitaan berterusan responden terhadap barang yang disita sebagai menyalahi undang-undang dan menuntut ganti rugi khas, am dan teladan terhadap responden. Mahkamah Tinggi menolak SP dan memerintahkan bahawa: (a) pendakwaan di bawah s 127(1) AK dimulakan terhadap perayu dalam tempoh dua bulan dari tarikh penyampaian perintah mahkamah, jika gagal, penyitaan berterusan barang itu dianggap menyalahi undang-undang dan tidak sah; dan (b) jika pertimbangan sedemikian, seperti yang dinyatakan di atas, berkuat kuasa atau jika Mahkamah dalam mendengar pendakwaan memutuskan tiada perintah pelucuthakan seharusnua dibuat terhadap barang yang disita, maka perayu bebas untuk memohon taksiran ganti rugi yang perlu dibayar kepadanya. Dalam rayuan semasanya, perayu berhujah bahawa: (i) selepas tamat tempoh 30 hari dari penyitaan,

memandangkan perayu telah pun membuat tuntutan untuk memulangkan barang yang disita dan tiada pendakwaan telah dimulakan, responden sepatutnya sama ada memulangkan barang yang disita atau merujuk perkara itu kepada majistret untuk keputusan di bawah s 128(3) AK dan oleh kerana ianya tidak dibuat, penyitaan berterusan barang itu adalah salah dari segi undang-undang; (ii) undang-undang mengkehendaki bahawa pendakwaan perlu dimulakan dalam tempoh 30 hari dari tarikh notis tuntutan pelepasan barang yang disita dibuat; dan (iii) Mahkamah Tinggi telah mengambilalih kuasa pendakwaan PR di bawah perkara 145 Perlembagaan Persekutuan dengan memerintahkan perayu didakwa dalam tempoh dua bulan. Dalam rayuan silang mereka, responden bersetuju dengan perayu berhubung isu pengambilalihan kuasa PR. Bagaimanapun, mereka berhujah bahawa s 128(3) AK tidak dilanggar kerana peruntukan itu tidak menyatakan tempoh masa (selepas tamat 30 hari) untuk Kastam sama ada melepaskan barang yang dirampas atau merujuk perkara itu kepada majistret untuk keputusan.

Diputuskan, sebulat suara membenarkan rayuan dan rayuan silang, mengetepikan keputusan Mahkamah Tinggi dan menyerahkan perkara itu kepada Mahkamah Tinggi untuk taksiran ganti rugi yang perlu dibayar kepada perayu:

(1) Responden tidak memulakan sebarang pendakwaan terhadap perayu dalam tempoh 30 hari dari tarikh notis penyitaan seperti yang dikehendaki di bawah s 128(1) AK, dan mereka juga tidak merujuk tuntutan perayu kepada mahkamah untuk siasatan di bawah s 128(4) AK selepas tamat tempoh 30 hari dari tarikh tuntutan perayu. Keengganan terang-terangan responden untuk mematuhi undang-undang menyebabkan penyitaan itu salah dan menyalahi undang-undang yang melayakkan perayu mendapat ganti rugi. Ketidakpatuhan terhadap s 128 AK adalah memudaratkan kerana ia melucutkan harta seseorang yang bertentangan dengan perkara 13(1) Perlembagaan Persekutuan (lihat perenggan 49–50, 53 & 67).

(2) Seksyen 128 AK dengan jelas menyatakan bahawa jika tiada pendakwaan berhubung dengan barang yang disita dalam tempoh 30 hari dari tarikh notis rampasan, barang itu akan disifatkan dilucuthakkan. Ini bermakna jika responden berhasrat untuk mendakwa, pendakwaan mesti dimulakan dalam tempoh 30 hari dari tarikh penyitaan. Tetapi jika tuntutan telah dibuat untuk memulangkan barang dalam tempoh 30 hari, maka sama ada pendakwaan mesti dimulakan dalam tempoh 30 hari dari tarikh tuntutan itu, atau, selepas tamat tempoh 30 hari, perkara itu mesti dirujuk kepada Ketua Pengarah Kastam ('DG') yang kemudiannya akan mengarahkan barang itu dilepaskan atau merujuk perkara itu untuk prosiding di bawah s 128(4) AK (lihat perenggan 54–56).

(3) Tiada keterangan kukuh yang menunjukkan bahawa responden telah mengambil apa-apa tindakan berhubung dengan barang yang disita itu mulai 21 Oktober 2022 sehingga perayu memberi notis bahawa ia akan mengambil tindakan undang-undang jika barang yang disita dan lori tidak dilepaskan. Selepas berdiam diri selama sembilan bulan sejak penyitaan, responden memaklumkan perayu pada Jun 2023 bahawa siasatan telah selesai dan kebenaran untuk mendakwa perayu telah diperoleh daripada timbalan pendakwa raya. Mahkamah tidak mempunyai peluang untuk memastikan tarikh sebenar apabila kebenaran untuk mendakwa diperolehi. Tiada bukti muktamad bahawa persetujuan untuk mendakwa dibuat sebelum tamat tempoh 30 hari dari notis tuntutan perayu. Juga tiada keterangan menunjukkan bahawa responden telah memaklumkan kepada perayu bahawa perkara itu sedang dalam siasatan sebelum 26 Jun 2023 (lihat perenggan 58–60 & 62).

(4) Mahkamah Tinggi terkhilaf apabila memutuskan bahawa tiada tempoh masa di bawah ss 128(3) dan (3A) AK untuk barang yang disita itu dilepaskan atau dirujuk kepada mahkamah selepas tamat tempoh 30 hari. Mahkamah Tinggi telah salah tafsir tafsiran s 128(3) AK dan telah gagal mengikuti keputusan Mahkamah Persekutuan mengenai perkara itu dalam *Sarmiina Sdn Bhd v Gerry Ho & Ors* [2023] 4 MLJ 870. Mahkamah Tinggi juga salah arah apabila ia menggunapakai s 127(1) AK kepada fakta kes apabila peruntukan itu sama sekali tidak terpakai (lihat perenggan 64–66).

(5) Mahkamah Tinggi melanggar perkara 145 Perlembagaan Persekutuan apabila ia mengambil alih kuasa pendakwaan Peguam Negara/PP di bawah perkara itu dengan memerintahkan supaya perayu didakwa dalam masa dua bulan selepas penerimaan perintah termeterai oleh responden (lihat perenggan 68–70).]

Cases referred to

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17; [1997] 2 CLJ 248, CA (refd)

Lai Soon Onn v Chew Fei Meng and other appeals [2019] 2 MLJ 96, CA (refd)

Modern Freight Express v Afzarizzal bin Abdul Wahab & Ors [2017] 6 MLJ 83, CA (refd)

Sarmiina Sdn Bhd v Gerry Ho & Ors [2023] 4 MLJ 870; [2023] 7 CLJ 349, FC (folld)

Soong Chee Kong v Public Prosecutor Ng Soon Sum and Anor v PP [1951] 1 MLJ 5 (refd)

Sunthararaju Pachayappan v Jabatan Kastam Diraja Malaysia [2009] MLJU 1882; [2010] 3 CLJ 865, HC (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the

A *estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721, FC (refd)

Legislation referred to

Customs Act 1967 ss 3(3), 65, 115(1)(a), (1)(b), 127(1), 128, 128(1), (1)(a) (2), (3), (3A), (3A)(b), (4)

B Federal Constitution arts 13(1), 145, 145(3)

Interpretation Acts 1948 and 1967 s 17A

Appeal from: Civil Appeal No BA-24–07–12 of 3023 (High Court, Shah Alam)

C

JR Ravendren a/l J C Ramalu (with Janeni Devi a/p Ravendren and Sri Kanapathi a/l Nyanasegaran) (J R Ravendren & Assoc) for the appellant.

Noor Fadzila bt Ishak (Senior Federal Counsel, Selangor State Legal Advisor's Office) for the respondents.

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Mariana Yahya JCA:

INTRODUCTION

E **[1]** The appellant filed a notice of appeal on 29 December 2023 to appeal against the decision made by the High Court judge of Shah Alam which had dismissed the appellant's originating summons on 22 December 2023. The respondents then on 29 January 2024 had cross-appeal against the order made by the High Court.

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THE PARTIES

[2] In this case, the appellant is the AGM Duty Free (Tengah) Sdn Bhd which was licensed by the Customs Department under s 65 of the Customs Act 1967 ('the Act') to operate a duty-free shop at Lot 23 and 25, Lorong Sg Chandong 12, Pulau Indah, Selangor which permitted the appellant to warehouse or store dutiable/taxable goods or goods on which customs duties taxes are unpaid at the plaintiffs premises to be sold to travellers.

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[3] The first respondent is Mohd Hafiz bin Ishak who, at the material time, was the investigating officer for this case pertaining to the seizure of various brands of beers and the lorry with registration No PLH 7299 at the appellant's premise.

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[4] The second respondent is Mohd Nor Hasyimi bin Adam who is *Ketua Unit Siasatan Frod Perdagangan.* The third respondent is the Director General of the Customs Department of Malaysia while the fourth respondent is the Government of Malaysia.

SALIENT FACTS

[5] On 23 September 2022, the appellant's goods were seized during the inspection conducted by the respondents in the appellant's premises. The seized goods comprised various brands of dutiable beers and a lorry with the registration No PLH 7299. The respondents issued the *notis sitaan* dated 23 September 2022 to the appellant (see exh 'DPS3'). Paragraphs 2, 3, and 4 of the *notis sitaan* state as follows:

> 2. Barang tersebut di atas disita kerana ada sebab-sebab yang munasabah untuk mensyakki bahawa kesalahan telah dilakukan di bawah Seksyen135(1)(8) Akta Kastam 1967.
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> 3. Menurut Seksyen 126 Akta Kastam 1967 semua barang yang disita boleh dikenakan lucuthak. Jika tiada tuntutan bertulis dibuat dalam *tempoh satu bulan kalendar* dari tarikh barang tersebut telah disita, barang-barang tersebut akan dilucuthak menurut Seksyen 128(1) Akta Kastam 1967.
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> 4. Sila ambil perhatian bahawa menurut undang-undang, barang-barang yang disita seperti di dalam notis penyitaan ini, jika tiada dijalankan pendakwaan, *akan dilucuthak* jika kamu tidak membuat satu tuntutan bertulis kepada Jabatan Kastam DiRaja Malaysia untuk pemilikan dalam masa *satu bulan kelendar bermula dari tarikh penyitaan*.

[6] Subsequently, the appellant issued a notice to claim dated 21 October 2022 (exh 'DPS6') to the respondents claiming the return of the goods seized by the respondents on 23 September 2022. It was made within one month from the date of the *notis sitaan*. The appellant has complied with s 128(1)(a) and (2) of the Act. However, the respondents did not respond to this letter.

[7] Once again on 19 June 2023, the appellant through his solicitor Messrs JR Ravendren & Assoc sent a letter to the respondents for the release of the seized goods. In this letter, the appellant's solicitor stated that the respondent's failure to release the seized goods would cause the appellant to initiate proceedings in court.

[8] On 26 June 2023, the first respondent sent a letter to the appellant stating that the investigation was completed and the consent to prosecute had been obtained from the deputy public prosecutor. The letter further stated that the *orang yang disyaki* ('OYDS') will be charged in the near future.

[9] On 10 October 2023, the respondent temporarily released/returned the lorry with registration number PLH 7299 to the appellant together with a semi-trailer with the registration No BKTR284319 to the agent of Direct Express (M) Sdn Bhd. The release/return of the vehicle was with a bond of RM40,000 for the lorry (PLH 7299) and another RM20,000 for the

semi-trailer. The respondent had also submitted the 'Sijil Pemulangan/Pelepasan Barang/Kenderaan di bawah s 115(1)(a) atau (b) Akta Kastam 1967'.

AT THE HIGH COURT

[10] On 21 July 2023, the appellant filed an originating summons at the High Court of Shah Alam. The appellant in commencing an originating summons had prayed as follows:

(a) a declaration that the seizure of the said goods and the said lorry by the first defendant is wrongful and therefore unlawful;

(b) special damages, general damages, and exemplary damages to be assessed by the Registrar of the court and to be paid by the defendants to the plaintiff;

(c) interest at the rate of 5% on the total damages assessed and awarded under para (b) above from the date of the seizure until the full settlement of the amount;

(d) the cost of the application to be borne and paid by the defendants; and

(e) all other reliefs as this honourable court deems proper and just.

[11] On 22 December 2023, the appellant's originating summons was dismissed by the High Court.

[12] The learned High Court judge had distinguished between the facts of the case in *Sarmiina Sdn Bhd v Gerry Ho & Ors* [2023] 4 MLJ 870; [2023] 7 CLJ 349 ('Sarmiina') and *Modern Freight Express v Afzarizzal bin Abdul Wahab & Ors* [2017] 6 MLJ 83 ('Modern Freight Express'), wherein, in these two cases, there were no steps taken by the customs officer to initiate a prosecution until the court hears of the originating summons suit. In contrast, in this instant case, before this matter came up for hearing, the Customs had already obtained consent from the deputy public prosecutor to prosecute the seized goods. The High Court also distinguished *Sarmiina* and *Modern Freight Express* in view that these cases were decided under the pre-amendment law of the Customs Act 1967.

[13] In para 34 of the High Court's grounds of judgment, the learned High Court judge stated that the Act did not stipulate that the prosecution must be commenced within 30 days of the appellant's request for the return of the goods or within a specified time after the expiry of the 30 days. His Lordship further stated that the Act requires that in the eventuality that there is no prosecution, the Director General shall either direct the return of the seized

goods to the claimant or refer the matter of seized goods to the magistrate for decision.

[14] The learned High Court judge also stated that the Act provides for jurisdiction to different courts depending on whether or not there is a prosecution. His Lordship opined that if there is a criminal prosecution, the court hearing the criminal prosecution shall have the jurisdiction to deal with and dispose of the seized goods by order of such court as stipulated under s 127(1) of the Act. His Lordship further stated that if there is no prosecution and the Director General does not direct the return of the goods to the claimant, the Director General shall refer the matter to the magistrate for examination and decision on whether or not to forfeit the goods as provided under s 128(3) and (3A) of the Act.

[15] The learned High Court judge further held that there were discrepancies in the documents regarding the goods. Accordingly, there was a reasonable suspicion to justify the seizure of the goods.

[16] Following that, the learned High Court judge has made the following orders.

> 39 Orders which should be made here
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> In the premises, the prayers sought in this originating summons were dismissed on the following terms:
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> (1) the prosecution pursuant to s 127(1) of the Customs Act 1967 shall be commenced within two months from the date of service of this sealed order, failing which the continued seizure of the goods shall be deemed to be unlawful and invalid;
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> (2) in the event that the final decision of the court hearing the prosecution pursuant to s 127(1) is that no order of forfeiture shall be made in respect of the seized goods or in the event that the continued seizure of the goods is deemed to be unlawful and invalid pursuant to the order in item (1) above, then the plaintiff shall be at liberty to apply to this court to assess the damages in the form of the value of the goods and to make order of damages in favour of the plaintiff; and
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> (3) the cost of this suit shall be costs in the cause of the assessment of damages (if any).

[17] Dissatisfied with the learned High Court judge's decision, hence this appeal before us.

A THE APPEAL BEFORE THIS COURT

[18] The appellant in its memorandum of appeal states six grounds of appeal as follows:

B 1. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang apabila memutuskan tidak ada tempoh masa untuk defendan-defendan merujuk tuntutan perayu ke Mahkamah yang bertentangan dengan seksyen 128(3) Akta Kastam 1967.

C 2. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang apabila memutuskan bahawa defendan-defendan hendaklah memulakan pendakwaan dalam tempoh masa dua bulan dari tarikh penerimaan perintah Mahkamah Tinggi yang termeterai di mana arahan tersebut adalah bertentangan serta bercanggah dengan Artikel 145 Perlembagaan Persekutuan.

D 3. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila gagal menimbang fakta bahawa tuntutan secara bertulis dibuat oleh perayu/plaintif adalah pada 21.8.2022 menuntut agar barangan yang disita dilepaskan kepadanya manakala kebenaran untuk mendakwa diperolehi oleh

E defendan-defendan hanya pada 26.6.2023 tetapi sehingga tarikh pendengaran pada 22.12.2023. defendan-defendan masih belum memulakan apa-apa pendakwaan terhadap perayu/plaintif.

F 4. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta dalam menolak permohonan perayu melalui Saman Pemula tersebut tetapi dalam masa yang sama setuju bahawa wujudnya satu tempoh masa untuk defendan-defendan merujuk perkara berkaitan penyitaan barang kepada Majistret.

G 5. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dalam salah-tafsiran seksyen 127 dengan keadaan kes kini di mana isu bukan berkenaan pelucuthakkan barang yang disita yang dibuat oleh perayu/plaintif dalam keadaan di mana pendakwaan tidak dimulakan dalam tempoh masa 30 hari dari tarikh tuntutan dibuat oleh perayu/plaintif.

H 6. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang apabila memegang tiada tempoh masa ditetapkan di bawah undang-undang jenayah untuk memulakan sesuatu pendakwaan tanpa menghayati objek dan niat yang ternaktub di bawah Akta Kastam 1967 yang memerlukan satu pendakwaan dimulakan dalam tenpoh masa

I 30 hari dari tarikh tuntutan dibuat.

[19] The grounds contained in paras 1–6 in the memorandum of appeal are primarily issues of law where the crucial element of law relates to the questions involving the interpretation of relevant laws and the applicable legal principles.

[20] At the outset, we note that the grounds raised in the memorandum of appeal encompass two broad areas as follows: A

(a) the legal principles applicable with respect to the seizure of goods under s 128 of the Customs Act 1967; and

(b) the usurpation of the powers of the public prosecutor by the learned High Court judge in imposing a time frame of two months from the date of the service of the court order to commence the prosecution in violation of art 145 of the Federal Constitution. B

ISSUES C

[21] For the purpose of this appeal, the appellant raised two main issues that are to be determined by this court as follows:

a. Sama ada berdasarkan kepada satu pentaksiran yang benar dan tepat terhadap subseksyen 128(3) dan subseksyen 128(4) Akta Kastam 1967 (Akta 235) bahawasanya dalam keadaan di mana tiada pendakwaan dijalankan dan di mana tuntutan sewajarnya dibuat oleh Plaintif terhadap penyitaan 2430 karton minuman keras pelbagai jenama (selepas ini dirujuk sebagai 'barang tersebut') di Gudang Lot 23 & 25, Lorong Sg Chandong 12, Pulau Indah, Selangor serta di dalam kenderaan lori dengan nombor pendaftaran PLH 7299, oleh defendan-defendan pada 23.9.2022, defendan-defendan gagal dan/atau enggan melepaskan barang tersebut tetapi terus menyita barang tersebut selepas tamat tempoh 30 hari dari tarikh tuntutan tanpa merujuk kepada Mahkamah adalah menyalahi undang-undang; dan D E

b. Sama ada berdasarkan kepada satu pentafsiran yang benar dan tepat terhadap subseksyen 128(3) Akta Kastam 1967 (Akta 235), kegagalan dan/atau keengganan defendan-defendan untuk melepaskan barang tersebut kepada plaintif dan kegagalan dan/atau keengganan defendan-defendan untuk merujuk tuntutan plaintif terhadap barang tersebut kepada Mahkamah selepas tamatnya 30 hari dari tarikh tuntutan hanya menjadikan penyitaan barang tersebut sebagai tidak sah. F G

PARTIES' SUBMISSIONS

Submission of the appellant

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[22] The appellant submitted that the crux of this case concerns the continuous seizure of goods since 23 September 2022 by the respondents without referring the appellant's claim to a magistrate pursuant to s 128(3) of the Customs Act 1967 when no prosecution was commenced within thirty days from the date of the appellant's claim making the seizure of the said goods as unlawful. I

[23] The appellant submitted that the law made it clear that when there is no prosecution in respect of the said goods within 30 days from the date of the

A claim and the respondents have no intention to release the goods, then the matter must be referred to the court on the expiry of 30 days from the date of the claim for a decision.

B **[24]** The appellant asserted that the law does not empower nor authorize the respondents to continue seizing the goods upon the expiration of 30 days from the date of the claim without any prosecution or referring the matter to the court for a decision when there is a claim for the said goods made in accordance to the law.

C **[25]** The appellant also submitted that the law had envisaged a time limit to commence prosecution where the prosecution has to be commenced within 30 days from the date of notice of claim.

D **[26]** Further, the appellant averred that the respondents had failed or refused to release the said goods. The respondents did not even refer the claim to the court for a decision on the expiration of the period stated under s 128(3) of the Act, which only made the continuous seizure as wrongful and unlawful.

E **[27]** To support the appellant's contentions, the appellants cited a few cases such as *Sarmiina* case, *Modern Freight Express* case, *Suntharaju Pachayappan v Jabatan Kastam Diraja Malaysia* [2009] MLJU 1882; [2010] 3 CLJ 865, and *Soong Chee Kong v Public Prosecutor Ng Soon Sum and Anor v Public Prosecutor* [1951] 1 MLJ 5, to support the proposition that when there is no prosecution in respect of the goods and the continuous seizure of goods without referring to court renders the seizure unlawful.

F

G **[28]** The appellant submitted that the continuous seizure of the said goods from 23 September 2022 until now without reference to the court had deprived the appellant of the property in contravention of the law.

[29] The appellant highlighted that since only the first respondent deposed the affidavits, it is crucial that the third respondent himself depose the same to ascertain whether the claim made by the appellant was referred to him in the first place.

H

[30] The appellant also submitted that the order made by the learned High Court judge for the respondents to commence the prosecution within two months from the receipt of the sealed order is usurping the power of the public prosecutor as enshrined under art 145 of the Federal Constitution.

I

[31] The appellant also highlighted that the consent to prosecute was only obtained after almost nine months from the date of the appellant's written

claim which is in breach of the express provisions of s 128(3) of the Act renders it as null and void.

Submission of the respondents

[32] The respondents in their cross-appealed had stated that the learned High Court judge had erred in law and facts in dismissing the appellant's originating summons.

[33] The respondents submitted that the learned High Court judge had erred in law when deciding that the respondents must commence the prosecution within two months from the date of the service of the sealed order, which was in contravention with art 145 of the Federal Constitution.

[34] On the other hand, the respondent asserted that the learned High Court judge had not erred in law in ruling that there is no period of time for the respondents to refer the appellant's claim to the court and this is not in contravention with s 128(3) of the Customs Act 1967.

[35] It was the respondents' submission that the amended provision of s 128(3) of the Act did not specify that the release of the seized goods or the reference to the magistrate court is to be made within 30 days. The amended provisions only specify that the Senior Customs Officer must refer the claim to or application to the Director General of Customs on the expiry of 30 days from the notice of the seizure.

[36] The respondents further submitted that the claim was referred to the Director General of Customs in accordance with s 128(3) of the Act which brings to the consent to prosecute by the deputy public prosecution being obtained to charge in court.

[37] The respondents asserted that there is no time prescribed under s 128(3A) for the Director General to direct the Senior Officer of Customs to release the seized goods or the proceeds sale of the goods or to refer the matter to the First-Class Magistrate for decision.

OUR DECISION

First issue

The legal principles applicable with respect to the seizure of goods under s 128 of the Customs Act 1967.

Section 128 Customs Act 1967 (Revised 1980) Act 235

[38] Section 128 of the Customs Act 1967 has undergone three amendments via Customs (Amendment) Act 1990 ('Act A783') on 31 August 1990, Customs (Amendment) Act 2019 ('Act A1593') on 1 January 2020 and Customs (Amendment) Act 2022 ('Act A1669') on 1 January 2023.

[39] Following all those amendments by Act A1593 (and at the time of the seizure of the goods), the current provision of s 128 of the Act reads as follows:

> 128 *Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.*
>
> (1) *If there be no prosecution with regard to any goods seized under this Act*, such goods or the proceeds of sale of *such goods* which are held pursuant to paragraph 115(1)(c) *shall be taken and deemed to be forfeited at the expiration of thirty days from the date of the notice of seizure of the goods unless, before such expiration —*
>
> (a) *a claim to such goods or the proceeds of sale of such goods is made under subsection (2)*;
>
> (b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or
>
> (c) such goods are returned under the said paragraph (a) or (b).
>
> (2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.
>
> (3) *If there is a claim or a written application made within the period of thirty days referred to in subsection (1) and there is no prosecution with regard to the goods, the senior officer of customs shall, on the expiration of the period of thirty days, refer the claim or the application to the Director General.*
>
> (3A) *Upon reference by the senior officer of customs under subsection (3), the Director General may direct such senior officer of customs —*
>
> (a) *to release such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b); or*
>
> (b) *by information in the form and manner as determined by the Director General, to refer the matter to a Magistrate of the First Class for his decision.*
>
> (4) The Magistrate of the First Class shall issue a summons 'requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act. (Emphasis added.)

[40] Upon scrutinizing the amended provisions of s 128(1) of the Customs Act, the following observations can be highlighted. The amendment made in sub-s (1) of s 128 is only on the substitution of 'one calendar month from the date of seizure of the goods' to the words 'thirty days from the date of the notice of seizure of the goods'. The new amendment made the provision clearer when it substituted the 'date of seizure of the goods' to the 'date of notice of seizure of the goods'. Therefore, there are no major changes made to this provision.

[41] Next, it is observed that sub-s (2) of s 128 of the Act was not amended by Act A1593. Subsection (3) of s 128 of the Act was amended by Act A1593 by substituting the words in sub-s (3) and adding a new sub-s (3A), which reads:

(3) If there is a claim or a written application made within the period of thirty days referred to in subsection (1) and there is no prosecution with regard to the goods, the senior officer of customs shall, on the expiration of the period of thirty days, refer the claim or the application to the Director General

(3A) Upon reference by the senior officer of customs under subsection (3), the Director General may direct such senior officer of customs —

(a) to release such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b); or

(b) *by information in the prescribed form*, to refer the matter to a Magistrate of the First Class for his decision. (Emphasis added.)

[42] The amendment to sub-s 3 and the insertion of the new sub-s 3A to s 128 of the Act by Act A1593 does not change the requirement that if there is no prosecution with regards to the goods within thirty days from the date of the notice of the seizure (which pre-amendment was one calendar month from the seizure), the Senior Officer of Customs is required to refer the matter to the Director General and for the latter to direct either the goods to be released or to refer the matter to a magistrate. The amendment by Act 1669 was a general amendment where the words 'in the prescribed form' in s 128(3A)(b) was substituted with words 'in the form and manner as determined by the Director General'. Therefore, after amendment by Act A1669, s 128(3A)(b) of the Act reads:

by information in the form and manner as determined by the Director General, to refer the matter to a magistrate of the First Class for his decision.

It is our considered view that this court's decision in *Modern Freight Express* where it had interpreted s 128 prior to its amendment by Act A1593, can serve

as a guidance except for the changes in regard to the period of 'one month from the date of seizure' which has been substituted to 'thirty days from the date of the notice of seizure'.

[43] In *Modern Freight Express*, Tengku Maimun JCA (as then she was, now CJ) in delivering the judgment of the court held that:

> [37] In the light of the authorities quoted earlier, we ruled that pursuant to sub-s 128(3) of the Act, where a written claim is made by the plaintiff for the said goods within one calendar month from the date of seizure and where no prosecution is commenced in respect of the said goods within the same period of time, then on the expiration of the one calendar month from the date of notice of claim, the defendants shall release the goods or refer the claim to the magistrate court. Since the defendants had failed to do either, we found that the defendants have failed to observe the statutory requirements under s 128 of the Act.

[44] The Federal Court in *Sarmiina* case in allowing the appeal by the appellant against the decision of the Court of Appeal held that the principles of law propounded in *Modern Freight Express* are relevant where His Lordship Nordin Hassan FCJ, in paras 37, 45, and 49 of the judgment said:

> [37] In the *Modern Freight* case, the goods seized were not released and the claim made was not referred to the magistrate, and as such the court held that s 128 of Act 235 had not been observed. The court allowed the prayer for a declaration that the seizure of the goods was invalid and remitted the case to the High Court for assessment of damages ... On 24 January 2018, the defendants' application for leave to appeal to the Federal Court in Case No 08462–10 of 2017 (B) was dismissed. The principle in the *Modern Freight* case we find is relevant to the present case.
>
> [45] As such, there was a valid written claim by the appellant for the release of the goods under s 128(2) of Act 235, and since the goods were not released to the appellant, the matter must be referred to the magistrate for decision as required under s 128(3) of the same Act. This was not done by the respondents even after receiving letters from consignors and after two years from the date of the seizure. This breaches s 128(3) of the Act 235.
>
> [49] The deprivation of the consignors' rights to the goods in this case was not in accordance with the law as the provision of s 128(3) has not been complied with. In the circumstances, the continuous seizure of the goods by RMCD in the present case is unlawful and invalid.

[45] What was emphasized in *Sarmiina* case is the choices that the Director General has in exercising his statutory duty when there is no prosecution which is either to release the goods or if not to direct the Senior Officer of Customs to refer the matter to the magistrate. The particular excerpt of judgment is as follows:

> [35] Next, if there is a claim under s 128(1)(a) as alleged by the appellant in the present case, the claim must be referred to the *Director General who then has two*

choices; either to release the goods to the claimant or if not, to direct the senior officer of RMCD to refer the matter to a Magistrate for decision as envisaged under s 128(3) of Act 235. In other words, if the Director General decides not to release the goods, in the existence of a valid written claim under s 128(1)(a), the claim must be referred to the Magistrate. The Director General has no other choice as the goods, if not released, cannot be forfeited where there is a valid written claim made within one month from the date of its seizure. The R5's statutory duty is to refer the matter to the Magistrate under the circumstances.

[46] In *Sarmiina* case, sub-s (1) to s 128 of the Customs Act is interpreted to mean as follows:

[34] Subsection 128(1) provides inter alia all seized goods, where there is no prosecution, are deemed to be forfeited after one month from the date of the seizure unless the existence of facts as stated under s 128(1)(a), (b), or (c). In other words, the goods are not to be deemed forfeited if any of the facts under s 128(1)(a), (b), or (c) has been established. The provision of s 128 is unambiguous and should not be given any other interpretation.

[47] In construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. First, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however, the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain, and clear, they must be given their natural and ordinary meaning (see *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721).

[48] Again, in the *Sarmiina* case, the pre-amendment provision of s 128 of the Customs Act 1967 was interpreted in its literal and ordinary meaning as the court found that the wording of the provision was plain and unambiguous. Nordin Hassan FCJ opined as follows:

[33] *On the application of s 128 of Act 235, firstly, the wordings of the provision are plain and unambiguous. As such, the provision must be given its literal and ordinary meaning. The intention of the Parliament by legislating a plain and unambiguous provision should be given its effect by the court and should not be interpreted in such a way as to affect its ordinary meaning* (see *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020]

A 7 CLJ 561 (FC); *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 (FC); *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; [2002] 1 CLJ 645 (FC)). (Emphasis added.)

B Applying the same principles enunciated in the *Sarmiina* case, we chose not to depart from the Federal Court decision that the provision of s 128 is unambiguous and should not be given any other interpretation.

[49] Coming back to this appeal, it is pertinent to note that the respondents C did not commence any prosecution against the appellant within 30 days from the date of notice of seizure as required under s 128(1) of Act 235 nor did the respondents refer the appellant's claim to the court for an inquiry under s 128(4) of Act 235 upon expiration of the 30 days from the date of the claim, when it refused to release the said goods to the appellant.

D

[50] The respondents had blatantly refused to comply with the law when the matter was not referred to a magistrate in the first place which is in breach of the statutory provision under s 128(3) of Act 235. This has resulted in the seizure being wrongful and unlawful.

E

[51] The respondents took the stance that there is no time frame stipulated under ss 128(3) and (3A) of the Act for prosecution in respect of the seized goods or referred to a magistrate on the expiration of 30 days from the date of F the claim, therefore the seizure could not be said invalid or unlawful.

[52] At this stage, the stand taken by the Federal Court in *Sarmiina* are appropriate to be followed where it was held as follows:

G [48] In the present case, the non-compliance with s 128(3) of Act 235 is fatal as it involves a deprivation of property of a person or party which is protected under art 13(1) of the Federal Constitution that states:

No person shall be deprived of property save in accordance with law.

H **[53]** Back to this current appeal, it is appropriate to follow the same stand that non-compliance with s 128 of the Act is fatal as it will deprive a person of their property which is guaranteed under art 13(1) of the Federal Constitution.

[54] From a clear reading of s 128 of the Act, it is our considered view that I there is an express provision under the law that if there be no prosecution with regard to any goods seized within 30 days from the date of notice of seizure of the goods, the goods are deemed to be forfeited, meaning to state that if the respondents intend to prosecute, it must be commenced within 30 days from the date of seizure.

[55] However, if there is a claim for the said goods within 30 days, then if the respondents intend to prosecute, a prosecution shall be commenced within 30 days from the date of the claim or on the expiration of 30 days, the Senior Officer of Customs shall refer the matter to the Director General as required under sub-s 128(3) of Act 235.

[56] It is clear from ss 128(3) and (3A) of the Act that if there is a claim and there is no prosecution in respect of the goods within 30 days, then the Senior Officer of Customs shall refer the claim to the Director General who shall release or refer the matter for a proceeding under s 128(4) of Act 235.

[57] The scheme of the provision clearly does not allow the respondents to be the persons to decide the status of the seized goods on the expiration of the 30 days from the date of the claim when there is a valid claim. Instead under s 128(3) and 128(4) of the Customs Act 1967, it is for the court to decide.

[58] The facts of the case show that the respondents who had admitted seizing the goods since 23 September 2022 still continued seizing the goods without referring the matter to court on the expiration of the 30 days from the date of claim made by the appellant on 21 October 2022. In fact, the respondents did not show any cogent evidence that they had taken any action from 21 October 2022 until the appellant through its solicitor Messrs JR Ravendren & Assoc vide a letter dated 19 June 2023 (exh DPS7) demanded that the respondents release the said goods and the motor lorry failing which the appellant insisted that it shall commence a legal suit against the respondents.

[59] After nine months without any response from the respondents, the respondents then vide their letter dated 23 June 2023 informed the appellant that they had completed the investigation and the consent from the deputy public prosecutor had already been obtained to prosecute the appellant under the Act 235 (see exh MHI2, first respondent's affidavit in reply affirmed on 21 September 2023).

[60] It is worth highlighting that the court did not have the opportunity to ascertain the actual date when the consent to prosecute was obtained from the deputy public prosecutor. In the letter sent by the respondents to the appellant, the actual date of consent was not mentioned. The parties in their submissions had only relied on the date of the letter dated 26 June 2023 which in our view is not conclusive proof that the consent to prosecute was made before the expiration 30 days from the notice to claim by the appellant.

[61] From our observation, we find that there was only one affidavit deposed by the respondents which was deposed by the first respondent ie the

investigating officer for this case. The first respondent averred that he was empowered by all the other respondents including the Director General of Customs to depose the affidavit in reply. The first respondent admitted that at all times he was under the control, direction, and supervision of the second and third respondents. It is vitally important that the third respondent to depose an affidavit himself as to whether the claim made by the appellant was referred to him in the first place. We do not agree that pursuant to sub-s 3(3) of the Act, the first respondent is competent to depose any affidavit on behalf of the Director General. In such circumstances where allegations on affidavit are unrebutted by the party against whom they are made, a court is entitled to conclude that such allegations have been accepted (see *Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin* [1997] 2 MLJ 17; [1997] 2 CLJ 248).

[62] Additionally, in so far as the status of the goods seized pending investigation by the respondent from 23 September 2022 and 21 October 2022 (notice to claim) is concerned, there was no evidence to show that the respondent had informed the appellant that the matter was under investigation before 26 June 2023. In any event, if it was true, we find that the respondents has yet to prosecute the appellant within the stipulated period which was not in this case.

[63] It is our considered view that when there is an express provisions of law that direct the respondents to do certain acts, the respondents could not ignore their statutory duty pursuant to s 128 of Act 235 especially where there was a valid claim made by the appellant within 30 days from the date of the seizure and when there is no prosecution done in respect of the seized goods on the expiration of the 30 days from the date of claim by the appellant.

[64] Based on the facts of the case, we find that the learned High Court judge had erred in law and fact in holding that there is no time frame pursuant to ss 128(3) and 128(3A) of Act 235 for the seized goods to be released or referred to the court in the expiration of 30 days.

[65] We also find that the learned High Court judge had misdirected himself in applying s 127(1) of Act 235 when the main crux of the application by the appellant is to determine the legal status of the continuous seizure of the goods by the respondents upon expiration of the 30 days period provided by ss 128(3) and (3A) of Act 235. We are of the considered view that s 127(1) of the Act does not apply to the given facts of the case. We find that the learned High Court judge had misconstrued the interpretation of s 128(3) of the Act.

[66] Given the above authorities, the respondents must observe the procedure stipulated in ss 128(3) and (3A) of the Act. At this juncture, the

respondents should be ordered to refer the matter to the magistrate court for its decision. Applying the principle of stare decisis, we do not see that the learned High Court judge should depart in its decision by not following the recent decision of the Federal Court in the *Sarmiina* case. We are of the view that if the learned High Court judge had applied the *Sarmiina* case as he was obliged to, His Lordship would have allowed the appellant's originating summons.

DAMAGES

Whether the appellant is entitled to damages

[67] In light of the non-compliance of s 128 of Act 235 by the respondents, the continuous seizure of the said goods since 23 September 2022 until now without any reference to court not only deprived the appellant of the property not in accordance with the law but also wrongful and unlawful, entitles damages to the appellant. Applying the same principles enunciated in the *Sarmiina* case, the case should be remitted to the High Court for assessment of damages.

SECOND ISSUE

The usurpation of the powers of the public prosecutor by the learned High Court judge in imposing a time frame of two months from the date of the service of the court order to commence the prosecution of the appellant. Whether usurpation of the power of the Attorney General by the learned High Court judge is in violation of art 145 of the Federal Constitution

[68] The learned High Court judge in his decision has ordered that the respondents commence the prosecution and/or prosecute the appellant within two months from the receipt of the sealed order.

[69] The power to institute or commence prosecution is ultimately left at the discretion of the public prosecutor pursuant to art 145(3) of the Federal Constitution. Article 145 of the Federal Constitution provides as follows:

> 145(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

[70] It is the Attorney General who has the conduct of prosecutions and not the court. It is also the prerogative of the Attorney General under art 145(3) of the Federal Constitution to institute, conduct, or discontinue any proceedings for an offence (see *Lai Soon Onn v Chew Fei Meng and other appeals* [2019] 2 MLJ 96). We find that the learned High Court judge had erred in his decision to direct or instruct the public prosecutor to commence a prosecution within

two months from the date of service of the sealed order of the court which in our view would violate art 145 of the Federal Constitution and if allowed will open floodgates to litigation of this nature.

CONCLUSION

Our decision is unanimous.

[71] In conclusion, based on the above reasons, we find that the learned High Court judge was plainly wrong in dismissing the appellant's originating summons that warrant our appellate intervention. We therefore allow the appellant's appeal with costs of RM10,000 here and below and the decision of the High Court dated 22 December 2023 is hereby set aside. We also ordered that the matter be remitted to the Shah Alam High Court for assessment of damages.

[72] To avoid repetition and overlapping, it is our observation that the respondents' cross-appeal is related to the second issue of the appellant's appeal, and in light of our decision to allow the appellant's appeal, we also allow the respondent's cross-appeal. We order no costs for the cross-appeal.

Order accordingly.

Reported by Ashok Kumar